

*Yaroslav Kozheurov**

THE CASE OF *JANOWIEC AND OTHERS* V. *RUSSIA*: RELINQUISHMENT OF JURISDICTION IN FAVOUR OF THE COURT OF HISTORY

INTRODUCTION

One can make various speculations about the possible conclusions of the European Court of Human Rights (“ECtHR”) on Russia’s alleged breach of its obligation to make proper and effective investigation if had recognized its competence to hear the case of *Janowiec and Others v. Russia* under Article 2 (right to life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (“the European Convention”). In my opinion there is little reason to doubt that had it addressed this issue substantively, the decision would have been in favour of the applicants.¹ For despite the promising start and the tremendous work conducted by Russian investigators in cooperation with their Polish colleagues and experts in 1991-1995 (search and mapping of burial sites, including the discovery of several previously unknown sites, exhumation of bodies, questioning of hundreds of witnesses, investigation and publication of a large number of archival documents that shed light on one of the worst crimes of Stalin’s totalitarian regime); and despite the political will shown by the new Russian leadership in the early 1990s (they stopped concealing the tragedy, published and handed over to the Polish side the documents from “package no. 1” along with most of files from case no. 159, and President Yeltsin issued an official apology at the Monument to the Victims of Katyń in Warsaw in 1993 and the Russian State Duma issued a statement on November 26, 2010); and despite the occurrence of many obstacles on the way to acknowledgement of this grave crime and full investigation of all its facts and circumstances and the objective difficulties faced by today’s investigation due to the long period of time that has elapsed since the crime and the destruction of most of the

* PhD, Associate Professor, Department of International Law of the Kutafin Moscow State Law University.

¹ Although, it could hardly have been unanimous – see ECtHR [GC], *Janowiec and Others v. Russia*, app. nos. 55508/07 and 29520/09, Judgment of 21 October 2013, concurring opinion of Judge Gyalumyan, available at <<http://www.echr.coe.int>>.

evidence,² I deeply believe – leaving aside for the moment the *ratione temporis* aspects – that the European Convention’s high standards for a proper and effective investigation as an element of the procedural obligations of a State under Art. 2 were not met. The factors that would have prevented the conducted investigation from meeting the Convention’s standards include: lack of an identified location of the crime and identified remains of most of the victims; the uncertainty as to the exact scope of the crime victims; the Respondent State’s refusal to recognize specific people as executed by the NKVD and, as a consequence, refusal to grant their relatives victims’ status and the right to rehabilitation; its refusal to allow victims’ families to read case materials and their complete exclusion from the investigation process;³ the contradictory position of the Russian Prosecutor’s Office and the courts, which, on the one hand, recognize the fact of execution,⁴ and on the other call the executed Polish nationals “missing persons”, even going so far as to suggest the possibility that some of them may have been validly executed as punishment for their crimes against the Soviet regime;⁵ the characterisation of the Katyń tragedy as “abuse of power”⁶ rather than a war crime;⁷ and, finally and most importantly, the security classifications assigned to some of the most important files of case no. 159, including the final decision of 21 September 2004 by which the investigation into the Katyń massacre was discontinued. As a result of these factors, it is hard not to agree with Judge Wojtyczek, who wrote: “The paramount question which arises in the present case is the temporal scope of the Convention.”⁸

1. INTERCONTINENTAL PARALLELS

In this regard, it is appropriate to draw parallels between the practice of the ECtHR and the Inter-American Court of Human Rights (“Inter-American Court”; “IACtHR”

² This factor was referred to by Judges Kovler and Yudkivska – see ECtHR, *Janowiec and Others v. Russia*, app. nos. 55508/07 and 29520/09, Judgment of 16 April 2012, joint concurring opinion of Judges Kovler and Yudkivska.

³ *Ibidem*, joint partly dissenting opinion of Judges Spielman, Villiger and Nussberger, para. 11. ECtHR [GC], *Janowiec and Others v. Russia*, paras. 52, 53, 55, 58, 59, 68, 69, 71.

⁴ ECtHR [GC], *Janowiec and Others v. Russia*, paras. 52 and 58.

⁵ *Ibidem*, para. 165.

⁶ *Ibidem*, paras. 58 and 64.

⁷ It should be noted that on 13 July 1994 Senior Military Prosecutor Yablokov, in charge of investigating the “Katyń Case”, ordered discontinuation of the criminal proceedings on the case no. 159 in connection with the deaths of the guilty parties. The said guilty parties were considered to be Stalin and other members of the Politburo who made the decision of 5 March 1940. They stood accused of committing crimes under Art. 6 of the Charter of the International Military Tribunal (war crimes and crimes against humanity). The decision was overturned by Yablokov’s superiors, ordering only some limited charges of abuse of power under the Criminal Code 1926 (see I. Yazhborovskaya, A. Yablokov, V. Parsadanova. *Katyn Syndrome in the Soviet-Polish and Polish-Russian Relations* <<http://www.katyn-books.ru/library/katynskijsindrom14.html>> accessed 15 February 2014).

⁸ ECtHR [GC], *Janowiec and Others v. Russia*, partly concurring and partly dissenting opinion of Judge Wojtyczek, para. 4.

in the footnotes). Such a comparative analysis is all the more interesting because in the present case both the applicants⁹ and the third parties¹⁰ actively cited the Inter-American Court case law. In addition, the ECtHR frequently refers to the Inter-American Court's practice.¹¹ Indeed, in its *Šilih v. Slovenia* judgement – which was heavily relied on in the *Janowiec* case and, according to Judge Wojtyczek, “marked a significant departure from the [ECtHR's] case-law”¹² – the Grand Chamber conducted a rather detailed analysis of the applicable precedents of the Inter-American Court,¹³ dedicating an entire section of its judgement to them and relying extensively on such precedents when presenting their conclusions. Finally, despite being a “younger court” in comparison with the ECtHR, the Inter-American Court has accumulated considerable experience in cases revolving around tragedies similar to the Katyń massacre – mass extrajudicial executions, massacres, forced disappearances, torture and other cruelties that have bedevilled much of Latin America during the military dictatorships of the 1960-80s. Jo M. Pasqualucci, a renowned researcher into the practice of the Inter-American Court, writes that: “[u]ntil the inclusion of Eastern European States, the European human rights system primarily dealt with isolated instances of human rights abuse, involving arrest and detention guarantees and fair administration of justice. Conversely, for many years the principal cases in the Inter-American system involved forced disappearances and extra-judicial executions resulting from intentional governmental policies.”¹⁴

In the *Šilih* case two Slovenian nationals were claiming inefficient investigation of the death of their son, which occurred a year before the Convention was ratified in Slovenia. The Grand Chamber took the opportunity to issue a ruling in the – until then

⁹ *Ibidem*, para. 173.

¹⁰ *Ibidem*, paras. 123-126, 176. See also “Janowiec and Others v. Russia. Written Comments of the Open Society Justice Initiative” <<http://www.opensocietyfoundations.org/sites/default/files/echr-janowiec-written-comments-20130116.pdf>>; “Janowiec and Others v. Russia. Written observations of Amnesty International” <<http://www.amnesty.org/pt-br/library/asset/IOR61/001/2013/en/2f7e3df1-7280-46e7-802a-008885788722/ior610012013en.pdf>>; “Victim Recognition and Satisfaction of Reparations. Third Party Intervention in Janowiec and Others v. Russia.” Prepared by the Public International Law & Policy Group <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2012/12/12.12.21_KATY_N-Amicus_PILPG_FINAL.pdf>; “Janowiec and Others v. Russia. Third Party Intervention by Human Rights Centre ‘Memorial’”, European Human Rights Advocacy Centre, Essex Transitional Justice Network School of Law, University of Essex <<http://www.memo.ru/uploads/files/914.pdf>> all accessed 15 February 2014.

¹¹ According to a ECtHR Research Division Research Report, as of August 2012 the ECtHR has made reference to the Inter-American Court of Human Rights in twenty-five cases (see *References to the Inter-American Court of Human Rights in the case-law of the European Court of Human Rights*, Research Report. 2012, available at <http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf>).

¹² ECtHR [GC], *Janowiec and Others v. Russia*, partly concurring and partly dissenting opinion of Judge Wojtyczek, para. 6.

¹³ ECtHR [GC], *Šilih v. Slovenia*, app. no. 71463/01, Judgment of 9 April 2009, paras. 114-118.

¹⁴ Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge University Press, Cambridge: 2003, pp. 4-5 (footnote omitted).

highly controversial – practice of the Chambers with respect to the possibility of applying the Convention to the *consequences* of events that occurred prior to the ratification of the Convention by a State.

Drawing on the practice of the Human Rights Committee, and “*in particular*” of the Inter-American Court, the ECtHR came to the following conclusion:

159. [...] [T]he Court concludes that the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of Article 2 it can give rise to a finding of a separate and independent “interference” within the meaning of the Blečić judgement [...]. In this sense it can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date.

160. This approach finds support also in the jurisprudence of the United Nations Human Rights Committee and, *in particular, of the Inter-American Court of Human Rights*, which, *though under different provisions*, accepted jurisdiction *ratione temporis* over the procedural complaints relating to deaths which had taken place outside their temporal jurisdiction (see paragraphs 111-118 above).¹⁵

A close examination of the approaches used by the Inter-American Court reveals that they are different from those applied by the ECtHR to the *Šilih* case and a number of subsequent cases, including *Janowiec and Others*.

Having reference to Article 28 of the Vienna Convention on the Law of Treaties 1969¹⁶ and general international law, the Inter-American Court in its decisions has repeatedly stressed¹⁷ that its jurisdiction extends only to acts and facts that occurred after the deposit of the instruments of ratification of the American Convention on Human Rights 1969¹⁸ (“the American Convention”), and the deposit of the instrument of recognition of the competence of the Inter-American Court to resolve disputes in accordance with Art. 62 of the American Convention: “[T]he Court cannot exercise its contentious competence to apply the Convention and declare a violation of its provisions when the alleged facts or the conduct of the defendant State that could involve international responsibility took place prior to that State’s acceptance of this competence. *Contrario sensu*, the Court is competent to rule on those violations that occurred after the date on which the State accepted the Court’s competence or that had not ceased at

¹⁵ ECtHR [GC], *Šilih v. Slovenia*, paras. 159-160 (emphasis added).

¹⁶ Vienna Convention on the Law of Treaties 1969 (signed in Vienna on 23 May 1969, entered into force on 27 January 1980), 1155 UNTS 331.

¹⁷ IACtHR, *Cantos v. Argentina*, Preliminary Objections, Merits, Reparation and Costs, Judgment of 7 September 2001, paras. 36-37; IACtHR, *Serrano-Cruz Sisters v. El Salvador*, Preliminary Objections, Judgment of 23 November 2004, para. 66 (available at <<http://www.corteidh.or.cr/>>).

¹⁸ American Convention on Human Rights (adopted in San José, Costa Rica, 22 November 1969, entered into force 18 July 1978), Basic Documents Pertaining to Human Rights in the Inter-American System (updated to February 2011), Secretariat of the Inter-American Court on Human Rights, San Jose, Costa Rica, 2011, pp. 29-56.

that date.”¹⁹ In the *Martín del Campo-Dodd v. Mexico* case, the Inter-American Court admitted the preliminary objection of Mexico that the Court lacked competence *ratione temporis* to examine the applicant’s conviction for the crime to which he confessed under torture, as the alleged acts of torture itself, and all judicial criminal proceedings associated with the case, had been completed prior to the date when Mexico recognised the Court’s contentious jurisdiction.²⁰

At the same time, the Inter-American Court acknowledged that “without infringing the principle of non-retroactivity, it can exercise its competence *ratione temporis* to examine those facts that constitute violations of a continuing or permanent nature; in other words, those that occurred before the date on which the Court’s competence was recognized, and that persist after that date.”²¹ In such cases, “the Court is competent to consider the conducts that occurred after the recognition of its jurisdiction and the effects of the violations.”²²

In the framework of continuing violations, special attention must be given to the concept of forced disappearances, developed thanks to the significant contribution of the Inter-American Court. Several years before the first international instruments on combating this criminal practice, either regional²³ or universal,²⁴ already in its first case the Court called the concept of forced disappearance “a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee.”²⁵ According to the Court, these rights include Art. 4 (right to life), Art. 5 (right to humane treatment, including the prohibition of torture) and Art. 7 (right to personal integrity).²⁶ Later Art. 3 (juridical personality) was added to this catalogue.²⁷

Further developing its articulated concept of the complex nature of forced disappearances, in the *Blake v. Guatemala* case the Inter-American Court said: “the effects of such infringements – even though some may have been completed, (...) – may be prolonged continuously or permanently until such time as the victim’s fate or whereabouts are

¹⁹ IACtHR, *Heliodoro-Portugal v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 12 August 2008, para. 24.

²⁰ IACtHR, *Alfonso Martín del Campo-Dodd v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 3 September 2004, para. 85.

²¹ IACtHR, *Heliodoro-Portugal v. Panama*, para. 25; IACtHR, *Nogueira de Carvalho et al. v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 28 November 2006, para. 45.

²² IACtHR, the *Serrano-Cruz Sisters v. El Salvador*, para. 67.

²³ Inter-American Convention on Forced Disappearance of Persons (adopted in Belém do Pará, Brazil on 9 June 1994, entered into force on 28 March 1996), Basic Documents, *supra* note 18, pp. 105-111.

²⁴ UN Declaration on the Protection of All Persons from Enforced Disappearance, 18 December 1992 (A/RES/47/133), International Convention on the Protection of All Persons from Enforced Disappearance of 2006 (adopted 20 December 2006, entered into force 23 December 2010), 2715 UNTS.

²⁵ IACtHR, *Velásquez-Rodríguez v. Honduras*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 29 July 1988, para 155.

²⁶ *Ibidem*, paras. 155-157.

²⁷ IACtHR, *Anzualdo-Castro v. Peru*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 22 September 2009, para. 90; IACtHR, *Contreras et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 31 August 2011.

established.”²⁸ In that case Nicholas Chapman Blake, an American freelance journalist, was kidnapped in 1985 by paramilitaries in Guatemala during an armed conflict and killed. Guatemala recognised the Court’s jurisdiction in 1987. Up until Blake’s remains were discovered in 1992, the journalist’s family had spent years in unsuccessful attempts to establish his fate. Based on the facts of the case, the Court held that it was competent to hear the case insofar as it concerned the consequences or actions that postdated the recognition of the jurisdiction of the Court by Guatemala.²⁹ Based on this reasoning, in the decision on the merits the Court did not consider alleged violations of Articles 4 and 7 of the American Convention, because the acts surrounding Mr. Blake’s deprivation of liberty and of life pre-dated the recognition of the jurisdiction of the Court by Guatemala.³⁰ Therefore, the Court only went so far as to establish the violations committed between 1987-1992, i.e. violation of Article 8 (right to a fair trial), which was given a “broad interpretation”, as well as of Article 5 (inhumane treatment), all in relation to Mr. Blake’s next of kin. According to the Inter-American Court, Art. 8 provides for the rights of Nicholas Blake’s relatives to an effective investigation into his disappearance and death, to a trial and sentencing of the perpetrators, and to compensation for their loss.³¹ The violation of Art. 5 was defined as the continuous attempts aimed at preventing Mr. Blake’s family from establishing the fate of Nicholas Blake, inasmuch as it was proved that the government knew about his death from the outset.³²

The Inter-American Court applied a similar principle in its judgement in *Serrano-Cruz Sisters v. El Salvador*.³³ It refused to consider all alleged facts concerning the violation of Articles 4, 5, and 7 of the American Convention which took place before the Court’s jurisdiction was recognised by El Salvador.³⁴ At the same time, the Court agreed to consider the facts and events associated with the kidnapping of the sisters that occurred after 6 June 1995, namely, the facts and events associated with the court proceedings initiated by their family in order to establish the fate of the children. According to the Court, these facts “constitute *independent facts*” and can be viewed as “*specific and autonomous violations* concerning denial of justice occurring after the recognition

²⁸ IACtHR, *Blake v. Guatemala*, Preliminary Objections, Merits, Reparation and Costs, Judgment of 2 July 1996, para. 39.

²⁹ *Ibidem*, para. 40.

³⁰ IACtHR, *Blake v. Guatemala*, Merits, Judgment of 24 January 1998, paras. 78, 86.

³¹ *Ibidem*, paras. 97-98.

³² *Ibidem*, paras. 114-116.

³³ El Salvador recognised the jurisdiction of the Court in 1995. In the period from 1980 to 1991 El Salvador was in a state of civil war. During that period, and especially in the early years of the war, it was a common practice among the government troops during their counter-insurgency operations against villages supporting the rebels to take away young children and given them to other families. These children had their names changed and often didn’t know anything about their previous homes. After the war, through the efforts of non-governmental organisations, the fate of many such children has been established – most of them were found alive and were able to reunite with their biological families. This, unfortunately, was not the case however for sisters Ernestina and Erlinda Serrano Cruz, who had been abducted in 1982, and since then their fate has remained unknown.

³⁴ IACtHR, the *Serrano-Cruz Sisters v. El Salvador*, paras. 77-78.

of the Court's jurisdiction."³⁵ The same terminology was used by the ECtHR several years later, in the *Šilih v. Slovenia*. However, the Inter-American Court considered these "autonomous violations" through the prism of Articles 8 and 25 of the American Convention (right to a fair trial and right to judicial protection). It found that the violation of these rights was established both in relation to the two kidnapped sisters and their families,³⁶ ruling that the domestic procedures were improper, ineffective, and inconsistent with the Convention's standards.

Similarly, in the case of *Moiwana Community v. Suriname*, the Inter-American Court refused to extend its competence to the events³⁷ which took place a year before Suriname recognised the Court's jurisdiction, but did acknowledge its competence to assess the implementation by the State of its duty to investigate these events in terms of the standards set out in Articles 8 and 25 of the American Convention.³⁸

Thus, the obligation to investigate violations of the rights guaranteed by the American Convention is viewed by the Inter-American Court as an autonomous, detached obligation that can be triggered by rights violations that occurred before the date of recognition of the Court's jurisdiction. If a violation of this autonomous obligation continues after the recognition of the jurisdiction of the Court, it may be subject to review on the basis of Articles 8 and 25 of the American Convention (right to a fair trial; right to judicial protection).

In this respect, the Inter-American Court's approach is different than that of the ECtHR. While the latter extends its jurisdiction with respect to the obligation to conduct a proper and effective investigation to rights violations that occurred prior to the ratification of the European Convention, it considers these obligations as *a procedural aspect of the positive obligations to protect the relevant rights* (for example, the right to life).³⁹ Thus, the ECtHR establishes violations of the relevant articles of the European Convention (Article 2 – the right to life, Article 3 – prohibition of torture) in their so-called "procedural limb", whereas the Inter-American Court views the obligation to investigate violations of the right to life, the right to humane treatment, the right to personal liberty not through the Articles of the American Convention that establish these rights (Articles 4, 5, 7), but rather through the stand-alone Articles 8 and 25 dealing with the right to a fair trial and the right to judicial protection.

At first glance, the difference between these approaches may seem merely technical. However, the method chosen by the Inter-American Court for extending its jurisdiction to the past allows it to avoid the requirement to demonstrate a "genuine connection between the death and the entry into force of the Convention in respect of the

³⁵ *Ibidem*, paras. 80, 84 (emphasis added).

³⁶ *Ibidem*, para. 107.

³⁷ The Surinamese military massacred the village community Moiwana, resulting in more than 40 victims, destruction of the village, and forced displacement of the remaining inhabitants.

³⁸ IACtHR, *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 15 June 2005, para. 141.

³⁹ ECtHR [GC], *Šilih v. Slovenia*, para. 159.

respondent State for the procedural obligations imposed by Article 2 to come into effect”,⁴⁰ as established by the ECtHR in the *Šilih* case. That was precisely the cornerstone question of the *Janowiec* case.

What’s interesting is that this approach is opposed by some judges of the Inter-American Court who claim to be advocating for a more “European approach”. In the dissenting opinion on the *Moiwana Community* case, Judge Cecilia Medina-Quiroga disagreed with the majority’s position and advocated that the obligation to investigate the Moiwana massacre of 1986 arises from the obligation to guarantee the right to life and personal integrity, and that failure to comply with this obligation constitutes a violation of Articles 4 and 5 of the American Convention, in conjunction with Art. 1(1).⁴¹ Later on, the Inter-American Court practice began to demonstrate the possibility of certain modifications to its approach. For example, in the *Heliodoro-Portugal* case the Court ruled that “the general obligation to ensure the human rights embodied in the Convention, contained in Article 1(1) thereof, gives rise to the obligation to investigate violations of the substantive rights that should be protected, ensured or guaranteed. Thus, in cases of extrajudicial executions, forced disappearance and other grave human rights violations, the Court has found that conducting a prompt, genuine, impartial and effective investigation ex officio is a fundamental and conditioning factor for the protection of certain rights that are affected or annulled by these situations, such as the rights to personal liberty, humane treatment and life.”⁴² Nevertheless, the procedural aspect of the violation of these rights was again considered by the Inter-American in the light of Articles 8 and 25.

In the case of *Garibaldi*, who was killed by masked armed men just one month before Brazil recognised the jurisdiction of the Inter-American Court, but six years after the ratification of the American Convention, the Court concluded that it had no competence to deal with the question of the State’s responsibility for depriving Garibaldi of his life and his inhumane treatment, as understood in the material aspect.⁴³ At the same time, the Court recognised that it could examine the fulfilment of obligation to investigate this murder, and not only under the Articles 8 and 25 of the American Convention, but also “in light of the procedural obligation derived from the obligation

⁴⁰ *Ibidem*, para. 163.

⁴¹ IACtHR, the *Moiwana Community v. Suriname*, concurring opinion of Judge Cecilia Medina, para. 5.

⁴² IACtHR, *Heliodoro-Portugal v. Panama*, para. 115. This case concerned the disappearance in 1970 in Nicaragua of a left activist. His remains were discovered in 2000, and forensic examination showed that the death had occurred at least 20 years earlier. Nicaragua recognised the Court’s jurisdiction in 1990. As before, the Court did not find itself competent to review the circumstances of the abduction and murder of Mr. Heliodoro-Portugal (i.e. it considered the violations of Articles 4 and 5 of the American Convention), but unexpectedly found that it may, in fact, consider the case in the light of alleged imprisonment of Heliodoro-Portugal (i.e. violation of Art. 7), “since this is related to his alleged forced disappearance, which continued after 1990, and until his remains were identified in 2000” (para. 37).

⁴³ IACtHR, *Garibaldi v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 23 September 2009, para. 22.

to guarantee rights arising from Article 4 of the Convention, in relation to Article 1(1) thereof.” Observing that Brazil ratified the American Convention in 1992, the Court held that, starting from that point in time, it was already bound by “all the obligations arising from the Convention, including the obligation to investigate and, if applicable, punish the deprivation of the right to life, even though the Court would not have competence to prosecute it for alleged violations of this right.”⁴⁴ However, the Court did not get the chance to speak about the alleged violation of procedural obligations under Article 4 of the American Convention, as the Inter-American Commission on Human Rights, in its submission of the case, limited the alleged victims to only Mrs. Garibaldi and her six children (through the prism of Articles 8 and 25), and excluded the late Mr. Garibaldi himself (on the basis of Art. 4).⁴⁵

2. PRESUMED DEATH OR CONFIRMED DEATH?

In the *Janowiec* case the third parties were actively referring⁴⁶ to a recent, and in many ways momentous for the Inter-American system, judgement in the case of *Gomes-Lund et al. v. Brazil*.⁴⁷ In that judgement, the Inter-American Court ruled that the State was responsible for forced disappearances and, consequently, for violations of the rights of 62 members of a rebel group provided by the Articles 3, 4, 5 and 7 of the American Convention. These violations had been committed in the early 1970s, i.e. over 20 years before Brazil recognised the Court’s jurisdiction. However, the Inter-American Court found itself competent to consider the said violations of their rights, ruling that the violations are of a continuous nature, continuing to this day. In the relevant part of its judgement, dedicated to analysis of the alleged violations, the Court pointed out that “acts which constitute enforced disappearance are of a continuous or permanent nature,” and “its consequences involve multi-offensive violations to the human rights recognized in the American Convention while the whereabouts of the victim are not determined or the bodily remains not found, to which States have the corresponding duty to investigate, and eventually, punish those responsible, pursuant to the obligations derived from the American Convention.”⁴⁸

However, in the operative part of its judgement the Inter-American Court again qualified the lack of proper investigation, identification and punishment of the pepe-

⁴⁴ *Ibidem*, para. 23.

⁴⁵ *Ibidem*, para. 24.

⁴⁶ *Supra* note 10; ECtHR [GC], *Janowiec and Others v. Russia*, paras. 122, 125.

⁴⁷ IACtHR, *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 24 November 24, 2010. This case concerned the slaughter, extra-judicial executions, and forced disappearances of members of the rebel group known as the “Araguaya Partisans” (Guerrilha do Araguaia) in 1970. The group was opposing the military junta that came to power in Brazil as a result of a military coup in 1964. Brazil recognised the jurisdiction of the Court in 1998.

⁴⁸ IACtHR, *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, para. 110.

trators as a violation of the rights of relatives of the disappeared persons under Articles 8 and 25 of the American Convention, whereas the violations of Articles 3, 4, 5 and 7 were established in relation to the disappeared persons themselves, apparently in their material aspect, as a consequence of the continuing nature of the enforced disappearances. This is evident, in particular, from the fact that the Court accepted as partially justified the objections of the respondent State, which claimed that the Court lacked competence *ratione temporis* with respect to one of the victims, whose remains were discovered in 1996, two years before Brazil recognised the Court's jurisdiction.⁴⁹ The Court recognised its lack of such competence by qualifying that person's death as an extrajudicial execution, rather than as a forced disappearance,⁵⁰ while at the same time it recognised violations of Articles 8 and 25 with respect to that victim's relatives.⁵¹ Remains of the other victims haven't been discovered to this day. This, evidently, has led the Court to a conclusion that the violations of Articles 3, 4, 5 and 7 of the American Convention, which began in the 1970s, continue to this day.⁵²

The ECtHR has also repeatedly faced the problem of enforced disappearances, for example in the cases concerning the events of 1992-1996 in the north-eastern part of Turkey, concerning the consequences of the 1960-1970 Cyprus conflict, the mid-1990s conflict in Bosnia and Herzegovina, as well as events which occurred in the Russian republics of the North Caucasus in 1999-2006.⁵³

Making references to international practice, the ECtHR has repeatedly affirmed the lasting nature of enforced disappearance: "A disappearance is a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred. This situation is very often drawn out over time, prolonging the torment of the victim's relatives. Thus, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation. This is so, even where death may, eventually, be presumed."⁵⁴

As we know, in the *Janowiec* case, the ECtHR "concluded that the applicants' family members who were taken prisoner in 1939 must be presumed to have been executed by the Soviet authorities in 1940."⁵⁵ A little earlier, the Court also recalled that it "has on many occasions made findings of fact to the effect that a missing person can be presumed dead,"⁵⁶ and cited several cases of forced disappearance. In this category of

⁴⁹ *Ibidem*, para. 16.

⁵⁰ *Ibidem*, para. 118, fn 154.

⁵¹ *Ibidem*, para. 180.

⁵² *Ibidem*, paras. 121-122.

⁵³ For a brief overview of the cases and scope of the problem see ECtHR, *Aslakhanova and Others v. Russia*, app. nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, Judgment of 18 December 2012, paras. 65-68, 161, 216.

⁵⁴ *Ibidem*, para. 122.

⁵⁵ ECtHR [GC], *Janowiec and Others v. Russia*, para. 156.

⁵⁶ *Ibidem*, para. 154.

cases both the Inter-American⁵⁷ and the European Courts use a presumption of death as a special legal (procedural) technique to avoid having to apply the *corpus delicti* principle (“no corpse – no crime”) to forced disappearances, and thus deprive the States of the argument that “the person is still alive or has not been shown to have died at the hands of State agents.”⁵⁸

However, in the *Janowiec* case the ECtHR used the presumption of death technique to a completely different end. First, the ECtHR referred to the *Varnava and Others v. Turkey* case, in which it had already formulated that, unlike the obligation to investigate a “suspicious death”, the obligation to investigate a “suspicious disappearance” is of a continuing nature. Thus the requirement of proximity of the death and the investigative steps connected with it to the date of entry into force of the European Convention, formulated in the *Šilih* case (which was a case of “suspicious death”), cannot be applied here.⁵⁹

The Grand Chamber thus found it necessary to cite the presumption of death in the *Janowiec* case,⁶⁰ only this time it used the presumption in order to bolster the Chamber’s opinion that “the period of time between the death and the critical date is not only many times longer than those which triggered the coming into effect of the procedural obligation under Article 2 in all previous cases, but also too long in absolute terms for a genuine connection to be established between the death of the applicants’ relatives and the entry into force of the Convention in respect of Russia.”⁶¹

Thus the ECtHR evidently classified the Katyń execution by firing squad not as an ongoing, but as an instantaneous act, as an extra-judicial execution, *based on presumption of death* rather than on the fact of discovery and identification of the victims’ remains.

Meanwhile, as discussed above, for the Inter-American Court the fact of discovery and identification of the remains is the key point which terminates the situation of enforced disappearance as a continuing violation. In certain cases, as may be inferred, the ECtHR has used a similar approach.⁶² In cases of enforced disappearances, a presump-

⁵⁷ IACtHR, *Castilio Paez v. Peru*, Merits, Reparations and Costs, Judgment of 3 November 1997, para. 73.

⁵⁸ ECtHR, *Aslakhanova and Others v. Russia*, para. 100.

⁵⁹ ECtHR [GC], *Varnava and Others v. Turkey*, app. nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment of 18 September 2009, paras. 148-149.

⁶⁰ ECtHR [GC], *Janowiec and Others v. Russia*, para. 135.

⁶¹ *Ibidem*, para. 157.

⁶² ECtHR [GC], *Varnava and Others v. Turkey*, paras. 86-87; ECtHR, *Aslakhanova and Others v. Russia*, paras. 223, 225; ECtHR, *Palic v. Bosnia and Herzegovina*, app. no.4704/04, Judgment of 15 February 2011, paras. 50-51. Moreover, in the *Varnava and Others v. Turkey* case the ECtHR especially pointed out that even the discovery of a body does not in and of itself terminate the obligation to investigate a crime: “Where disappearances in life-threatening circumstances are concerned, the procedural obligation to investigate can hardly come to an end on discovery of the body or the presumption of death; this merely casts light on one aspect of the fate of the missing person. An obligation to account for the disappearance and death, and to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain” (para. 145).

tion of death used to be a necessary condition to establish a violation of the legal right to life. Conversely, in the case presently under our consideration, the presumption of death played a role of the factor severing the link between the substantive and procedural limbs of violation of the right to life, turning the latter aspect into a detachable autonomous obligation.

Further on in the *Janowiec* judgement, this time in the part motivating the application of Article 3 to the case, i.e. in a somewhat different context, the “presumed death” miraculously turned into a “confirmed death”: “Having regard to the long lapse of time, to the material that came to light in the intervening period and to the efforts that were deployed by various parties to elucidate the circumstances of the Katyń massacre, the Court finds that, as regards the period after the critical date, the applicants cannot be said to have been in a state of uncertainty as to the fate of their relatives who had been taken prisoner by the Soviet Army in 1939. It necessarily follows that what could initially have been a ‘disappearance’ case must be considered to be a ‘confirmed death’ case.”⁶³

Based on the fact that “in 1990 the USSR officially acknowledged the responsibility of the Soviet leadership for the killing of Polish prisoners of war; in the following years, the surviving documents relating to the massacre were made public and the investigators carried out further partial exhumations at several burial sites; and a round of consultations was held between Polish, Russian, Ukrainian and Belarusian prosecutors,”⁶⁴ the Court concluded that “no lingering uncertainty as to the fate of the Polish prisoners of war could be said to have remained. *Even though not all of the bodies have been recovered*, their death was publicly acknowledged by the Soviet and Russian authorities and has become an established historical fact.”⁶⁵ This finding is inexplicably “undisturbed by the pronouncements of the Russian courts in various domestic proceedings which appeared to withhold explicit acknowledgement of the fact that the applicants’ relatives had been killed in the Soviet camps.”⁶⁶

The applicants complained that the position of the Russian authorities was causing them moral suffering.⁶⁷ It appears that in this part of the decision of the Grand Chamber, the mindset of European judges is not that far removed from their Russian colleagues. In this light, it would be curious to look once again to the facts of *Gomes-Lund et al. v. Brazil* case and its assessment by the Inter-American Court. On December 4, 1995 Brazil passed Law No. 9.140/95, by which it recognised its responsibility for the “murders of the political opposition” in the periods between 1961-1979. This Law “automatically recognised 136 cases of disappeared persons contained in a [d]ossier’ organized by next of kin and human rights defenders after [...] years of searches.” The Annex to this Law also listed names of 60 members of Guerrilha do Araguaia,⁶⁸ and es-

⁶³ ECtHR [GC], *Janowiec and Others v. Russia*, para. 185.

⁶⁴ *Ibidem*, para. 184.

⁶⁵ *Ibidem*, para. 186 (emphasis added).

⁶⁶ *Ibidem*, para. 185.

⁶⁷ *Ibidem*, para. 174.

⁶⁸ IACtHR, *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, para. 91.

tablished the Special Commission on Politically Motivated Deaths and Disappearances of Persons, which is responsible, among its other functions, “in carrying out the recognition of the disappeared persons not included in Annex 1 of [said] law.”⁶⁹ The Final Report of the Special Commission was published. Law No. 9.140/95 also established the possibility to grant a pecuniary remedy to the next of kin of the deceased and those who politically disappeared. On the date of the Inter-American Court’s judgement on *Gomes-Lund et al.* case, Brazil had compensated the next of kin of 58 disappeared persons of the Guerrilha do Araguaia indicated as alleged victims in the case, in a total sum equivalent to USD 3,772,000.00.⁷⁰ Nevertheless, due to the lack of information about the whereabouts of the victims’ remains,⁷¹ the Inter-American Court found a violation of the rights to juridical personality, to life, to personal integrity, and to personal liberty, established in Articles 3, 4, 5, and 7 of the American Convention,⁷² as well as violation of the right to humane treatment enshrined in Article 5 of the American Convention with respect to the next of kin of the victims.⁷³ The Court obliged Brazil to “effectively conduct, within the ordinary jurisdiction, the criminal investigation of the facts of the present case in order to ascertain them, determine those criminally responsible, and effectively apply the punishment and consequences which the law dictates”,⁷⁴ as well as to “carry out all efforts to determine the whereabouts of the disappeared persons, and where applicable, identify and return the bodily remains to the next of kin.”⁷⁵

3. THE RIGHT TO THE TRUTH: MISSING A CHANCE

Having accepted that the death of the Polish prisoners of war “has become an established historical fact”, and that there is no “lingering uncertainty as to the fate of the Polish prisoners of war”, the ECtHR not only went on to express its opinions regarding the allegedly violated rights of the victims’ families, but also closed the “window of opportunity” to contribute to the developing doctrine that the “the right to truth” has both individual and collective dimensions.⁷⁶

According to Principle 2 of the UN’s Updated Set of principles for the protection and promotion of human rights through action to combat impunity “every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or

⁶⁹ *Ibidem*, para. 92.

⁷⁰ *Ibidem*, para. 93.

⁷¹ *Ibidem*, para. 121.

⁷² *Ibidem*, para. 325.4.

⁷³ *Ibidem*, para. 325.7.

⁷⁴ *Ibidem*, para. 325.9.

⁷⁵ *Ibidem*, para. 325.10.

⁷⁶ Extensive consideration of the “right to truth” was given by the Open Society Justice Initiative in its Written Comments to the case of *Janowiec*, *supra*, note 10, paras. 17-46.

systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.”⁷⁷

While the UN authorities view the right to truth as an inalienable and autonomous right,⁷⁸ the Inter-American and European Courts derive it from the State’s obligation to investigate violations of the rights granted by the relevant Conventions.

The Inter-American Court has issued a large body of judgements (which is understandable in the light of the violence which accompanied the transition period from dictatorship to democracy in the majority of Latin American countries) in which it affirms the peoples’ right to know the truth, which “is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention.”⁷⁹

In order to establish a procedural obligation to investigate violations, the ECtHR uses a different legal technique. For that reason, in its judgements (by far less numerous than those of the Inter-American Court) the right to truth is viewed as a part of the procedural aspect of the rights protected under Articles 2, 3 and 5 of the European Convention. In a case concerning the obligation to investigate the circumstances of the massacres which occurred during the Romanian revolution in 1989, the ECtHR pointed out “the importance of the right of victims and their families and dependants to know the truth about the circumstances of events involving massive violation of fundamental rights such as the right to life, which implies the right to effective judicial investigation and the possible right to compensation.”⁸⁰

In the *Janowiec* case, where the right to truth couldn’t be considered under Article 2 due to the Court’s determination that it lacked competence, in its Judgement of 16 April 2012 the Chamber referred to the right to know the truth in the context of Article 3: “The Court appreciates that the applicants suffered a double trauma: not only had their relatives perished in the war but they were not allowed, for political reasons, to learn the truth about what had happened and forced to accept the distortion of historical fact by the Soviet and Polish Communist authorities for more than fifty years.”⁸¹ However, the Grand Chamber found that since, from the date the Convention was rati-

⁷⁷ Commission on Human Rights. Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, 8 February 2005, p. 7.

⁷⁸ Human Rights Council. Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”. Right to the truth. Report of the Office of the High Commissioner for Human Rights, A/HRC/5/7, 7 June 2007, para. 85; Commission on Human Rights. Study on the right to the truth. Report of the Office of the United Nations High Commissioner for Human Rights. E/CN.4/2006/91, 8 February 2006, para. 55.

⁷⁹ IACtHR, *Bámaca-Velásquez v. Guatemala*, Merits, Judgment of 25 November 2000, para. 201.

⁸⁰ ECtHR, *Association 21 December 1989 v. Romania*, app. no. 33810/07, Judgment of 24 May 2011, para. 144 (original: *French*).

⁸¹ ECtHR, *Janowiec and Others v. Russia*, para. 156.

fied by Russia, there has remained no uncertainty about the fate of the Polish prisoners of war – their death had become a “historical fact”.

Even if we agree with the highly controversial view that there is no historical ambiguity in the fate of the Polish prisoners, still the question arises whether “historical truth” can substitute for “judicial truth”? According to the Inter-American Court, it cannot. Considering the activities of the various reconciliation and truth commissions to be elements of the transitional justice mechanism, the Court has repeatedly pointed out that “the ‘historical truth’ included in the reports of the above mentioned Commissions is no substitute for the duty of the State to reach the truth through judicial proceedings. In this sense, Articles 1(1), 8 and 25 of the Convention protect truth as a whole.”⁸²

It appears that the victim-oriented Art. 3 of the European Convention, with the existing broad scope of interpretation developed in the ECtHR’s jurisprudence, recognising the practice of withholding information and non-conduct of a proper investigation as inhuman treatment,⁸³ is not the most convenient instrument for developing the right to truth – especially in its social dimension. Here again, it is appropriate to recall that the Inter-American Court had long refused, despite the views of the Inter-American Commission, to consider the link between the right to truth and the right to receive and disseminate information⁸⁴ (Art. 13 of the American Convention, Freedom of Thought and Expression). However, in the *Gomes-Lund* case the Inter-American Court for the first time in its practice did precisely that. It broadened the right to truth and derived this right not only from Articles 8 and 25, but also from Art.13: “the next of kin of the victims and society must be informed of all that occurred in regard to said [gross human rights] violations.”⁸⁵ The right to truth “is linked to access to justice and to the right to seek and receive information enshrined in Article 13 of the American Convention.”⁸⁶

It is regrettable that the events surrounding the Katyń tragedy have not been considered in the context of Art. 10 of the European Convention. The position taken by the victims’ families, who focused their efforts in the national and European institutions on the right to rehabilitation, are explainable and understandable. What’s interesting is a concomitant attempt to challenge the classification of the decision to discontinue criminal case no. 159 as “top secret” – a document which should contain the main conclusions of the investigation, and thus be of an enormous public interest. The only party dealing with this aspect was the human rights organization “Memorial”,⁸⁷ and the topic has not been pursued further at the ECtHR.

⁸² IACtHR, *Almonacid-Arellano et al v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 26 September 2006, para. 150.

⁸³ For a summary of the practice see ECtHR [GC], *Janowiec and Others v. Russia*, paras. 177-181.

⁸⁴ IACtHR, *the Rochela Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of 11 May 2007, para. 147.

⁸⁵ IACtHR, *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, para. 202.

⁸⁶ *Ibidem*, para. 201.

⁸⁷ ECtHR [GC], *Janowiec and Others v. Russia*, paras. 61-65.

The potential of Article 10, in the context of top secret classification of criminal case materials, seems to me quite evident. As the Inter-American Court commented in the *Gomes-Lund et al.* case in the context of the right to information: “in cases of violations of human rights, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or pending procedures. Moreover, when it comes to the investigation of punishable facts, the decision to qualify the information as secretive or to refuse to hand it over cannot stem solely from a State organ whose members are charged with committing the wrongful acts. In the same sense, the final decision on the existence of the requested documentation cannot be left to its discretion.”⁸⁸

The ECtHR could have considered this issue, albeit indirectly, through the prism of Russia’s failure to implement its procedural obligations to assist the Court. In this sense, the Court’s decision to recognise Russia’s violation of its obligations under Article 38, expressed in its failure to submit to the Court copies of the classified decision to discontinue the criminal case no. 159, viewed against the background of the Court’s failure to consider or recognise the violation of substantive provisions of the Convention, emphasises the importance the Court attached to this issue.

A related question naturally arises out: does a violation of a procedural obligation under Section II of the Convention, as found by the Court, give rise to consequences that, according to the ECtHR’s practice, follow from the obligations under Art. 46 of the European Convention to abide by the final judgement of the Court, and namely: “to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects”?⁸⁹

On the one hand, the ECtHR clearly links its Art. 46 rhetoric with Art. 1, which contains the obligation to respect and ensure the rights recognised in Section I of the European Convention on Human Rights. According to the Court, ‘appropriate general and/or individual measures’ must be aimed at securing “the right of the applicant which the Court found to be violated. Such measures must also be taken in respect of other persons in the applicants’ position, notably by solving the problems that have led to the Court’s findings.”⁹⁰ Yet a violation of Art. 38 is a violation of the Court’s right, not that of the applicants.

On the other hand, the fact that the finding of such violation shall have no consequences in effect deprives this part of the Judgement of all meaning. Having said that, what the precise scope of consequences established by the Court in the *Janowiec* case are remains an open question.

⁸⁸ IACtHR, *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, para. 202.

⁸⁹ ECtHR [GC], *Scozzari and Giunta v. Italy*, app. nos. 39221/98 and 41963/98, Judgment of 13 July 2000, para. 249.

⁹⁰ ECtHR, *Savridin Dzburayev v. Russia*, app. no. 71386/10, Judgment of 25 April 2013, para. 247.

4. BETWEEN THE SCYLLA OF HUMANITARIAN IDEALS AND THE *CHARYBDIS* OF STATE SOVEREIGNTY

I am far from idealising the Inter-American Court and do not propose the blind application of its experience – experience that often tends more to give an example of how an international court ought not to act than how it should.⁹¹

The Inter-American human rights system has its advantages, but, naturally it also has its disadvantages, the main of which is the extremely low efficiency of its decisions. While giving the proper due to the contribution of the Inter-American Court's jurisprudence to the protection and promotion of human rights – and not only in the Americas but worldwide – we mustn't lose sight of the fact that States all too frequently manage to sabotage the Court's decisions. And this is true in particular of those concerning “far-reaching measures to reduce impunity and advance human rights (such as prosecuting past violations or changing laws and practices).”⁹² For example, in 2007 the Inter-American Court stated that only 12% of its resolved cases have been fully executed and complied with.⁹³ As of 1 January 2013, out of 162 cases reviewed by the Inter-American Court, 138 (around 85%) were still at the stage of monitoring compliance with judgments.⁹⁴ In other words, the Court could not confirm their full execution.

This deplorable situation has many causes, one of which is that the Inter-American Court is not always able to maintain the delicate balance between the promotion and protection of human rights and the scope of its treaty body competence accepted by the States when recognising the Court's jurisdiction.

The uncompromising character of the Inter-American Court, its lack of flexibility and diplomacy (the latter of which is often claimed to be used in excess by the ECtHR, including in the *Janowiec* case) leads very often to the fact that its decisions, while embodying the highest humanistic ideals, remain on paper only. It is difficult to expect effectiveness from an international court's decisions when they impose obligations on States which they could not have reasonably foreseen when accepting the compulsory jurisdiction of the treaty body.

This appears to be precisely the threat referred to by Judge Wojtyczek in his partly concurring and partly dissenting opinion to the decision of the Grand Chamber in the *Janowiec* case. He described the ECtHR's position in the *Šilih* case as “imposing retro-

⁹¹ A textbook example is the Inter-American Court's decision, which caused an uproar in Latin America. The Court obliged Peru to engrave on the monument *The Eye That Cry*, erected in memory of the victims of civil conflicts, among the names of those killed by terrorists also the names of the very same terrorists, if they had been subjected to ill-treatment, torture and murder in prison – IACtHR, *the Miguel Castro-Castro Prison v. Peru*, merits, reparations and costs, Judgment of 25 November 2006, para. 470.16.

⁹² J. Cavallaro & S. Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 *American Journal of International Law* 768 (2008) 785.

⁹³ *Ibidem*, p. 786.

⁹⁴ Annual Report of the Inter-American Court of Human Rights, 2012, p. 13-17, available at <<http://www.corteidh.or.cr/>>.

active obligations on the High Contracting Parties that they could not have foreseen at the date of ratification of the Convention”⁹⁵ and urged the Court “to agree to return to its initial interpretation of the principle of the non-retroactivity of the Convention”,⁹⁶ based on Article 28 of the Vienna Convention on the Law of Treaties.

In this connection it is also appropriate to refer to the relatively recent decision of the International Court of Justice (“ICJ”) of July 20, 2012 in the case *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, in which ICJ took an extremely strict and conservative stance on the principle of the non-retroactivity of international treaties. In this case, the dispute concerned Senegal’s compliance with its obligation to prosecute Mr. Hissène Habré, former President of the Republic of Chad (1982-1990), or to extradite him to Belgium for the purpose of criminal proceedings.⁹⁷ Belgium based its claims on the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984⁹⁸ (“Convention against Torture”), which was ratified by Senegal on 26 June 1987.

With respect to the temporal scope of the obligation to prosecute laid down in Article 7, para. 1 of the Convention against Torture, the question was “namely whether the Convention applies to offences committed before 26 June 1987, Belgium contends that the alleged breach of the obligation *aut dedere aut judicare* occurred after the entry into force of the Convention for Senegal, even though the alleged acts occurred before that date. Belgium further argues that Article 7, paragraph 1, is intended to strengthen the existing law by laying down specific procedural obligations, the purpose of which is to ensure that there will be no impunity and that, in these circumstances, those procedural obligations could apply to crimes committed before the entry into force of the Convention for Senegal. For its part, the latter does not deny that the obligation provided for in Article 7, paragraph 1, can apply to offences allegedly committed before 26 June 1987.”⁹⁹

The ICJ, with a reference to Art. 28 of the Vienna Convention on the Law of Treaties, firmly rejected this approach, indicating that “the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned.”¹⁰⁰ According to the Court, “nothing in the Convention against Torture reveals an intention to require a State party to criminalize, under Article 4, acts of torture that took place prior to its entry into force for that State, or to establish its jurisdiction over such acts in accordance with

⁹⁵ ECtHR [GC], *Janowiec and Others v. Russia*, partly concurring and partly dissenting opinion of Judge Wojtyczek, para. 6.

⁹⁶ *Ibidem*.

⁹⁷ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Rep. 2012, p. 422, para. 1.

⁹⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), available at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>>.

⁹⁹ ICJ, *Questions relating to the Obligation to Prosecute or Extradite*, para. 98.

¹⁰⁰ *Ibidem*, para. 100.

Article 5. Consequently, in the view of the Court, the obligation to prosecute, under Article 7 paragraph 1 of the Convention does not apply to such acts.”¹⁰¹

As can be seen, the ECtHR’s position on its temporal jurisdiction represents the mean (and one would like to believe that it’s a golden mean at that) between the two ends of the spectrum: the conservative approach of the ICJ and the unrestrained “human rights imperialism”¹⁰² of the Inter-American Court. And the European Court of Human Rights is trying to feel its way between the *Scylla* of humanitarian ideals and the *Charybdis* of State sovereignty.

On the one hand, the need to fight impunity with respect to serious and flagrant violations of human rights and to strengthen the existing law through the development of the procedural aspects of human rights protection do not always fit into the Procrustean bed of the non-retroactivity principle. On the other hand, the ECtHR doesn’t want to risk gaining a “threatening” image in the eyes of the States, appearing as a supra-national lawmaker and thus seriously compromising the persuasive force and effectiveness of its decisions.¹⁰³ Having opened a Pandora’s Box in the *Šilih v. Slovenia* case, the ECtHR attempted to pull it closed a little bit in the *Janowiec* case.

The criteria for retroactive effect of the Convention, being a product of the ECtHR’s judicial activism (and some might say “over-the-top” activism), were initially themselves contradictory, ambiguous and unclear. This was pointed out in several dissenting opinions of judges in the *Šilih* case, and acknowledged as well by the ECtHR in the *Janowiec* case, where the Court recognised the need for their clarification.¹⁰⁴ However, the methods and the results of such “clarification” leave many questions. In trying to even out the surplus of its activism, the ECtHR went forth with even more activism. Essentially, the Court ended up creating a new “statute of limitations” norm (10 years) regarding the “genuine connection” criterion¹⁰⁵ and, in a decision more based on rule-of-thumb than strict legal reasoning, decided “that the ‘Convention values’ clause cannot be applied to events which occurred prior to the adoption of the Convention, on 4 November 1950, for it was only then that the Convention began its existence as an international human rights treaty”,¹⁰⁶ – a conclusion which could have easily been the last one in the Judgment, before moving on to the operative paragraphs.

¹⁰¹ *Ibidem*.

¹⁰² This expression was used by the representative of the United Kingdom in the *Al-Skeini and Others v. the United Kingdom* case regarding the extension of its jurisdiction by the ECtHR, although not in terms of time, but geographically – ECtHR, *Al-Skeini and Others v. the United Kingdom*, app. 55721/07, Judgment of 7 July 2011, concurring opinion of Judge Bonello, para. 37.

¹⁰³ This makes one think of the example of ambiguous practice of pilot judgments, in particular the situation with the electoral rights of prisoners in the UK – ECtHR, *Greens and M.T. v. the United Kingdom*, app. nos. 60041/08 & 60054/08, Judgment of 23 November 2010.

¹⁰⁴ ECtHR [GC], *Janowiec and Others v. Russia*, para. 140.

¹⁰⁵ *Ibidem*, para. 146.

¹⁰⁶ *Ibidem*, para. 151.

CONCLUSIONS

There is no doubt that the *Janowiec* case ruling is the result of a compromise. How much compromise is possible in cases of massive and flagrant violations of fundamental human rights is a separate question to consider. Most of the ECtHR judges, not wanting to risk the stability of the European system, demonstrated their unwillingness to deal in detail with the black pages of Europe's past, handing this right over to historians.

Judges Kovler and Yudkivska, in their joint concurring opinion to the Grand Chamber's Judgement, expressed their belief that "the European Convention on Human Rights, having arisen out of a bloody chapter of European history in the twentieth century, was drafted 'as part of the process of reconstructing western Europe in the aftermath of the Second World War', and not with the intention of delving into that black chapter."¹⁰⁷

Judge Wojtyczek follows a similar line: "It seems that the aims of the Convention were solely prospective: regard being had to Europe's painful past, the issue was that of preventing future violations of human rights."¹⁰⁸

Astonishingly enough, in this case the two most similar opinions come from the judges selected to represent the States that in these proceedings took diametrically opposed positions. Their outlined positions on the case can be characterised as "relinquishment of jurisdiction in favour of the Court of History."

¹⁰⁷ ECtHR, *Janowiec and Others v. Russia*, joint concurring opinion of Judges Kovler and Yudkivska.

¹⁰⁸ ECtHR [GC], *Janowiec and Others v. Russia*, partly concurring and partly dissenting opinion of Judge Wojtyczek, para. 5.